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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 776

DWIGHT D. CLARKE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

JOHN F. GARVIN,
ANTHONY SAVAGE,
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Seattle, Washington.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Petitioner, DWIGHT D. CLARKE, respectfully shows to this Honorable Court that this is a Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit, to review a decision made and entered by that Court on the 30th day of December, 1942, rehearing denied on the 6th day of February, 1943, affirming a judgment of conviction in the United States District Court for the Western District of Washington, Northern Division:

134626

A.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The grand jury of the United States of America for the Western District of Washington, Northern Division, returned an indictment of four counts charging the petitioner and one Tom Drummey with having used the United States mails in order to carry out a scheme to defraud, in violation of Sec. 338, Title 18 U. S. C. A. (R. 2.) Both defendants were convicted on all four counts. (R. 19.) The conviction was affirmed on December 30th, 1942, the case at the present date being unreported. (R. 531.)

The pertinent portions of the statute involved are as follows, Sec. 338 of Title 18 U. S. C. A.:

> "Whoever having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * *shall for the purpose of executing such scheme or artifice* * * * or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circulars, pamphlets, or advertisements in any post-office or station thereof or street or other letter-box of the United States, or authorized depositary for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom." (Italics ours.)

The charging part of the indictment, as set out in

Count One, and incorporated by reference in all the other counts, describing the scheme is:

> "That heretofore and prior to the several acts of using the United States mails hereinafter set forth, the defendants together with one Lester Main, now deceased, had devised and intended to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises * * * and the said defendants, and each of them, so having devised and intending to devise the scheme and artifice aforesaid, *for the purpose of executing the same,* and attempting so to do * * * did knowingly, wilfully, unlawfully and feloniously cause to be placed in the United States Post Office, etc. * * *" (Italics ours.) (R. 2, 5.)

The indictment alleged and proof was adduced to show that the defendants, together with one Lester Main, then deceased, devised a plan and scheme to obtain from one victim, a Mrs. Jean Hunter, large blocks of valuable Coca Cola stock by means of false and fraudulent representations. In exchange for such stock she was to receive first shares in a worthless concern known as Main Laboratories (owned principally by Lester Main), and thereafter in the Seattle Loan & Discount Company, of which the defendant Drummey was president. The mailing, under which the trial court secured or assumed jurisdiction, in the first count, was the mailing by the brokerage firm of E. A. Pierce & Co. of Seattle, Washington, of certain Coca Cola stocks to their home office in New York City.

Count two charges a similar mailing of similar stocks by the same company to their home office in New York City. The third count sets out a letter from the defendant Tom Drummey acting in his capacity as president of the Seattle Loan & Discount Company and written at the direction of the Board of Directors of that company. This letter was addressed to the defendant, Dwight D. Clarke. The fourth count sets out a letter written by the defendant Drummey to Mrs. Jean M. Hunter, in response to an inquiry from her, detailing the transactions she had had with the Seattle Loan & Discount Company.

There is no evidence of any kind tending to show that the petitioner, DWIGHT D. CLARKE, personally mailed or caused to be mailed any of the letters described in the indictment.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The decision of the Circuit Court of Appeals in approving and upholding the trial court's instruction set out below is:

1. Untenable and in conflict with the weight of authority;

2. Passes upon an important question of Federal Law which has not been but which should be settled by this court;

3. Departs so far from the usually accepted course of judicial proceedings as to call for the Supreme Court's jurisdiction.

4. Amends and modifies the Postal Fraud Statute and substitutes one of its own making, changing and lowering the standard of guilt.

THE INSTRUCTION.

"The jury is further instructed that if they are convinced beyond a reasonable doubt from the evidence that the defendants or either of them, did devise a scheme or artifice or joined in a scheme or artifice to defraud Mrs. Hunter and did use or cause the mails to be used *in connection therewith,* that it is the duty of the jury in such event to find such defendant or defendants, guilty of such count or counts, regardless of whether the jury might believe that Mrs. Hunter agreed to sell her Coca Cola stock to Mr. Drummey at 10% below the market on the sale date or agreed to sell through him as a broker, as in neither event would anyone have a right to defraud Mrs. Hunter." (Italics ours.)

WHEREFORE, your petitioners pray that a Writ of Certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the

case numbered and entitled on its docket No. 9914, DWIGHT D. CLARKE, the Petitioner, v. United States of America, Respondent, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States, and that the judgment herein of said Circuit Court of Appeals for the Ninth Circuit be reversed by the court, and for such further relief as to this court may seem proper.

JOHN F. GARVIN,
ANTHONY SAVAGE,
H. SYLVESTER GARVIN,
Attorneys for Petitioner.

Dated February 27, 1943.

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term 1942.

No.

DWIGHT D. CLARKE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

I.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was rendered, entered and filed on December 30, 1942 (R. 530), rehearing denied February 6, 1943. (R. 532.)

II.

JURISDICTION.

1. The judgment to be reviewed was entered on December 31, 1942. (R. 531,) Petition for rehearing was denied February 6, 1943. (R. 532.) The time to apply for a writ of certiorari runs from February 6, 1943.

Morse v. United States, 270 U. S. 151, 153.
Craig v. United States, 298 U. S. 637.

2. The federal courts have jurisdiction to determine issues arising out of the construction of federal statutes. Sec. 41, Title 28 U. S. C. A.; (Judicial Code, Sec. 24, par. 1.) Appeal to the Circuit Court of Appeals was taken in pursuance of the provisions of Sec. 225, Title 28 U. S. C. A. (Judicial Code, Sec. 128).

3. This court has jurisdiction to reverse the judgment of the Circuit Court of Appeals, Sec. 347, Title 28 U. S. C. A.; (Judicial Code, Sec. 240 (a)).

III.

STATEMENT OF THE CAE.

A summary statement of the case to determine the issue of jurisdiction has been given under heading "A" in the Petition. In the interest of brevity the statement will not be repeated here.

ARGUMENT.

Specification No. 1.

The Court erred in giving the following instruction:

> "The jury is further instructed that if they are convinced beyond a reasonable doubt from the evidence that the defendants or either of them, did devise a scheme or artifice or joined in a scheme or artifice to defraud Mrs. Hunter and did use or cause the mails to be used in connection therewith, that it is the duty of the jury in such event

to find such defendant or defendants, guilty of such count or counts, regardless of whether the jury might believe that Mrs. Hunter agreed to sell her Coca Cola stock to Mr. Drummey at 10% below the market on the sale date or agreed to sell through him as a broker, as in neither event would anyone have a right to defraud Mrs. Hunter."

To the instruction the petitioner duly excepted on the ground that it was an incorrect statement of law and not in conformity with the statute, which states specifically that the mails must be used in order to carry out or to further the particular scheme to defraud. (R. 492.)

The error assigned under this specification must be self-evident. There can be no quarrel with the principle that the gist of the crime of using the United States mails to carry out a scheme to defraud is the use of the mails. All the authorities are in accord. *Byron v. U. S.*, 273 Fed. 769. With respect to the mailing, both the statute itself and the decisions interpreting and construing it declare such mailing must be for the *purpose of executing a fraudulent scheme or attempting to do so.* The gravamen of the mailing is the specific purpose. Without such specific purpose, there is no offense. Incidental use of the mails or use without that specific purpose in mind does not violate the Postal Fraud Statute. *Stapp v. U. S.*, 120 F. (2) 898. "The significant fact is intent and purpose." *Byron v. U. S.*, 273 Fed. 769.

The vice of the instruction is that it is so broad it includes any and every mailing which might have the slightest possible connection with the scheme described, even though such mailing was not prompted by a purpose to execute the plan. It removes the element of purpose from the crime, and allows the jury to convict on less evidence than required by the statute. It lowers the standard of guilt and criminality by amending and modifying the statute. This was recognized by the Circuit Court of Appeals when it stated in its opinion, "the instructions when challenged, standing alone, are incorrect because they do not require that the mails be used for the purpose of executing the scheme or attempting so to do. There is no crime unless the mails were used for the purpose mentioned." (R. 529.) In short, the use of the mails must be purposeful and intentional to result in culpability.

It must be admitted that elsewhere in the charge, the trial court correctly instructed the jury respecting this matter. However, that cannot cure the error complained of.

Instructions are erroneous when they contain both a correct and an incorrect statement of law, unless it appears that the correct statement is meant to be a correction of the erroneous statement. Such instructions are apt to prevent the jury from giving due consideration to the evidence in the light of the correct

instructions, and it is impossible to ascertain which instruction the jury followed. Further, the jury should not—nay, it cannot—be required to determine which part of the contradictory instruction is correct. 23 Corpus Juris Secumdum 1307; *Nicola v. U. S.*, 72 F. (2) 780.

Not only was the erroneous statement not corrected, but, by reason of its position in the charge, it was constituted an enlargement and amendment of the instruction held to be correct by the Circuit Court of Appeals. (R. 530.) Moreover, it was emphasized and magnified by the trial court's refusal to modify or clarify when exception was taken thereto.

Your petitioner respectfully submits that such an instruction, described by the Circuit Court of Appeals as "incorrect" (R. 529) and "not a model of clarity with respect to the point urged" (R. 530), one which places no proper bounds upon the jury, deprived him of the fair and impartial trial granted and guaranteed by the laws of his land.

CONCLUSION AND PRAYER.

For the foregoing reasons it is respectfully urged that the petition in this case be granted and the judgment of the Circuit Court of Appeals for the Ninth

Circuit and United States District Court for the Western District of Washington, Northern Division, be reversed.

Respectfully submitted,

JOHN F. GARVIN,
ANTHONY SAVAGE,
H. SYLVESTER GARVIN,
Attorneys for Petitioner.

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519332—43

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 776

DWIGHT D. CLARKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 522–530) is reported at 132 F. (2d) 538.

JURISDICTION

The judgment of the circuit court of appeals was entered December 31, 1942 (R. 531), and a petition for rehearing was denied February 6, 1943 (R. 532). The petition for a writ of certiorari was filed March 2, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and

Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether, in view of the fact that the trial judge had correctly instructed the jury that the mailings alleged in an indictment under the mail fraud statute must have been for the purpose of executing the scheme to defraud, the judge's passing reference at a later point in his charge to use of the mails "in connection with" the scheme, misled the jury so as to constitute prejudicial error.

STATUTE INVOLVED

The mail fraud statute (Section 215 of the Criminal Code, 18 U. S. C. 338) provides in part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, * * * in any post office, * * * or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, * * * or shall knowingly cause to be delivered by mail according to the direction thereon, * * * any such letter, postal card, package, writ-

ing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioner and Tom Drummey were indicted on December 12, 1940, in the district court for the western district of Washington in four counts charging them with using mails in the execution of a scheme to defraud Mrs. Jean Hunter (R. 2–13). The indictment alleged that the defendants, together with Lester Main, then deceased, having learned that Mrs. Hunter owned a large number of highly valuable shares of the stock of the Coca-Cola Company and the Coca-Cola International Corporation, planned and schemed to procure possession of, and authority to sell, the shares for the pretended benefit of Mrs. Hunter and her family, but in truth and in fact for the purpose of gaining control of the proceeds of the shares and converting them to their own use and benefit and the benefit of certain business concerns in which they were interested (R. 2–3). It was further alleged that in order to induce Mrs. Hunter to deliver the shares to them the defendants and Main represented to her that the Coca-Cola Company was in a precarious business condition and was likely to fail within two years, that, consequently, it was unsafe for her to retain her shares in that company and the Coca-Cola International Corporation, that it would be more advisable for

her to deliver the shares to them for sale and allow them to invest the proceeds in safer and more desirable securities, and that the defendant Drummey was a man of large experience in such matters and a person in whom Mrs. Hunter could safely repose confidence and who would manage her affairs in the safest and most advantageous way (R. 3–4). The indictment then alleged that these representations were false, that by means of them the defendants and Main induced Mrs. Hunter to deliver to them all of her fortune in Coca-Cola Company and Coca-Cola International Corporation stock, and that they sold the stock and converted almost all of the proceeds to their own use and benefit and for the benefit of failing and practically worthless business enterprises in which they were interested (R. 4–5). Each count alleged a separate mailing for the purpose of executing the scheme. The mailings upon which the first and second counts were based were registered air mail parcels addressed to E. A. Pierce & Co., New York City, and containing certificates for shares of the stock of the Coca-Cola Company and the Coca-Cola International Corporation (R. 5–6, 6–7). The mailing described in the third count was a letter from Drummey, as president of the Seattle Loan & Discount Company, to petitioner (R. 8–10), and that described in the fourth count was a letter from Drummey to Mrs. Hunter (R. 10–13).

Petitioner and Drummey were convicted on all four counts (R. 19), and petitioner was sentenced

to four years' imprisonment on each, the sentences to run concurrently (R. 22–33). On appeal by petitioner alone, the circuit court of appeals affirmed his conviction (R. 531).[1]

ARGUMENT

Petitioner's sole contention (Pet. 4–5, 8–11) is that the trial judge committed reversible error when, in the course of his charge to the jury, he stated that if they found that the defendants or either of them had devised or joined in a scheme to defraud Mrs. Hunter and "did use or cause the mails to be used in connection therewith," it would be the duty of the jury to find such defendant or defendants guilty (R. 488–489).[2] Petitioner cor-

[1] Petitioner does not challenge the sufficiency of the evidence to support the conviction and, therefore, we deem it unnecessary to delineate the proof adduced at the trial. The evidence is summarized in the opinion of the circuit court of appeals (R. 524–527) and the court held that it was sufficient to support the verdict both as to the scheme alleged in the indictment and as to the causing of the indictment letters to be mailed in the execution of the scheme (R. 528).

[2] The text of the portion of the instructions of which petitioner complains is as follows (R. 488–489):

"The jury is further instructed that if they are convinced beyond a reasonable doubt from the evidence that the defendants or either of them, did devise a scheme or artifice or joined in a scheme or artifice to defraud Mrs. Hunter and did use or cause the mails to be used in connection therewith, that it is the duty of the jury in such event to find such defendant or defendants, guilty of such count or counts, regardless of whether the jury might believe that Mrs. Hunter agreed to sell her Coca Cola stock to Mr. Drummey at 10% below the market on the sale date or agreed to sell through him as a broker, as in neither event would anyone have a right to defraud Mrs. Hunter."

rectly states (Pet. 9) that the gist of the offense under Section 215 of the Criminal Code (*supra*, pp. 2–3) is the use of the mails for the purpose of executing a scheme to defraud or attempting so to do,[3] and his argument is that the instruction referred to was bad because it did not require the jury to find that the mails were used for that purpose, but allowed them to convict if they found that the mailings were merely connected with the scheme (Pet. 10). A reading of the charge as a whole,[4] however, readily shows that there is no merit in petitioner's contention.

In an earlier part of the charge devoted specifically to expounding to the jury the nature and elements of the crime denounced by the mail fraud statute and alleged in each count of the indictment, the trial judge carefully explained that the of-

[3] *Badders* v. *United States*, 240 U. S. 391, 393–394; *United States* v. *Young*, 232 U. S. 155, 161; *Durland* v. *United States*, 161 U. S. 306, 315; *Stapp* v. *United States*, 120 F. (2d) 898, 899 (C. C. A. 5); *Lonergan* v. *United States*, 88 F. (2d) 591, 594 (C. C. A. 9), reversed on other grounds, 303 U. S. 33; *Brady* v. *United States*, 24 F. (2d) 399, 402 (C. C. A. 8); *Byron* v. *United States*, 273 Fed. 769, 771–772 (C. C. A. 9), certiorari denied, 257 U. S. 653.

[4] It is settled that the trial court's charge to the jury must be considered in its entirety. *Graham* v. *United States*, 120 F. (2d) 543, 546 (C. C. A. 10); *Martin* v. *United States*, 100 F. (2d) 490, 497 (C. C. A. 10), certiorari denied, 306 U. S. 649; *Haggerty* v. *United States*, 5 F. (2d) 224, 226 (C. C. A. 7); *Colt* v. *United States*, 190 Fed. 305, 308 (C. C. A. 8), certiorari denied, 223 U. S. 729; *Horn* v. *United States*, 182 Fed. 721, 740 (C. C. A. 8), certiorari denied, 219 U. S. 585; see also *United States* v. *Schenck*, 126 F. (2d) 702, 708 (C. C. A. 2), certiorari denied *sub nom. Moskowitz* v. *United States*, 316 U. S. 705; cf. *Mills* v. *United States*, 164 U. S. 644.

fense consists "of two parts, (1) the devising the scheme or artifice to defraud or for obtaining money or property from another by means of false or fraudulent pretenses and promises and (2) the mailing or causing to be mailed within the jurisdiction of the Court some article of mail matter in furtherance of such scheme or plan" (R. 473); that "It is the purpose inspiring the sending of the matter through the mail that brings the one causing the matter to be mailed within the Mail Fraud Law" (R. 474); and, again, that "the mail matter must have some relation to and be a step in the attempted execution of the scheme and must be mailed or cause (*sic*) to be mailed with the intent to aid its execution" (*ibid.*).[5] The particular instruction of which petitioner complains appears in a subsequent portion of the charge in which the judge cautioned the jury that certain inferences which they might draw would not exculpate the defendants (R. 486–487, 487–489), and, as appears from its context (n. 2, p. 5, *supra*), the import of the instruction was that the jury could not acquit merely because they might believe that Mrs. Hunter agreed to sell her stock to the defendant Drummey at 10 percent below the market value or to sell through him as agent, "as in neither event would anyone have a right to defraud Mrs. Hunter" (R. 489).

[5] In addition, at other points in his charge, the judge iterated that the use of the mails must be in furtherance of a scheme to defraud (R. 468, 487–488; see also R. 465, 470–471, 479).

Although, as the court below observed, the instructions were "not a model of clarity with respect to the point urged" (R. 530), it can scarcely be said that by his passing use of the phrase "in connection with"[6] the trial judge purported to modify his earlier correct instructions that the mailings must have been for the purpose of executing the scheme to defraud, or that this phrase misled the jury as to the nexus required by the statute between the scheme to defraud and the use of the mails. Moreover, there is no contention by petitioner that the mailings were not, in fact, in execution of the scheme.[7]

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[6] This phrase appears in two other passages in the charge (R. 468, 473), but it is clear from the context that it was used in the sense of "in furtherance of" the scheme to defraud.

[7] Although petitioner states (Pet. 4) that there was no proof that he personally mailed or caused to be mailed any of the indictment letters, he does not deny the sufficiency of the evidence to support the jury's finding that he was a party to the scheme to defraud. The issue whether petitioner was chargeable with the mailings was submitted to the jury under instructions that "The defendants would be guilty if they devised or helped devise the unlawful scheme and caused an innocent party to place the package in the post-office in furtherance thereof," and that they "would be responsible if the matter were placed in the mail in the ordinary course of business as a natural and probable consequence of the plan or scheme that had been devised and for the purpose of forwarding the same. If there is in operation such a scheme, any defendant consciously and knowingly cooperating therein is responsible for the mailings although he may not have known of the particular act of mailing at all" (R. 473–474). In addition, the court instructed the jury to the effect that if the defendants joined in the scheme to defraud there was, in the contemplation of the law, a conspiracy, and each

CONCLUSION

The decision below is correct, and there is involved no conflict of decisions or question of general importance. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
ROBERT S. ERDAHL,
J. BENSON SAKS,
Attorneys.

APRIL 1943.

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of them became responsible for the acts of the other in furtherance of the common plan (R. 474–475). These instructions were correct. *United States* v. *Kenofsky*, 243 U. S. 440, 443; *Stapp* v. *United States*, 120 F. (2d) 898, 899 (C. C. A. 5); *Hart* v. *United States*, 112 F. (2d) 128, 131 (C. C. A. 5), certiorari denied, 311 U. S. 684, 722; *United States* v. *Weisman*, 83 F. (2d) 470, 472–473 (C. C. A. 2), certiorari denied, 299 U. S. 560; *Alexander* v. *United States*, 95 F. (2d) 873, 880 (C. C. A. 8), certiorari denied, 305 U. S. 637; *Cochran* v. *United States*, 41 F. (2d) 193, 199–200 (C. C. A. 8); *United States* v. *Herzig*, 26 F. (2d) 487, 489 (S. D. N. Y.); *Chambers* v. *United States*, 237 Fed. 513, 524 (C. C. A. 8).

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